United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-2154

To be argued by:
VINCENT L. LEIBELL, III

United States Court of Appeals
FOR THE SECOND CIRCUIT

HOWARD LIPINSKI,
Petitioner-Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,
Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT-APPELEE

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Issue Presented

Whether it was a denial of the appellant's Sixth Amendment right, where after the appellant had called a witness the trial court refused to allow the appellant the opportunity to impeach that witness.

Statement of the Case

The appellant was charged by Misdemeanor Information with the crime of Petit Larceny. As a result of a trial held on October 9, 1974 the appellant was found guilty by a jury of his peers of Attempted Petit Larceny (New York Penal Law—110/155.25). Thereafter, he was sentenced to serve a term of imprisonment of 30 days, incarceration to be at the Westchester County Penitentiary.

Following the trial, an appeal was taken to the Appellate Term of the New York State Supreme Court (9th and 10th Judicial Districts). The decision of the trial court was affirmed and on May 17, 1976 the Honorable Matthew J. Jasen of the New York Court of Appeals denied a request for Leave to Appeal to that court.

Thereafter, the appellant brought a pro se petition for a writ of Habeas Corpus in the United States District Court for the Southern District of New York. On July 7, 1976 the Honorable Henry Werker dismissed the petition. Subsequently, on July 13, 1976, Judge Werker granted a certificate of probable cause.

Facts

On March 15, 1974, at approximately 7:30 P.M., the appellant Lipinski entered the Gimbels Bros. Department store (hereinafter known as Gimbels) located in Cross County Shopping Center in Yonkers, New York. The appellant was carrying a brown shopping bag in his hand (18).* One store detective, Starrish, was able to look inside the shopping bag and saw contained therein only an umbrella (18). The appellant proceeded to the stairs leading to the basement floor of Gimbels and went directly to the Sporting Goods Department (19). He was followed to that area by two store detectives, Starrish and Bendetson.

The appellant walked to that area of the Sporting Goods department where tennis rackets are displayed on the wall (19). Looking around him, he then took two tennis rackets off the wall and placed these items in the shopping bag which he was carrying (19). The tennis rackets were Wilson brand rackets, model T-3000, valued at $49.98 each (60). He then proceeded to the sales counter in the

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* Numbers in parentheses refer to the pages of the record on appeal.

Sporting Goods Department and told the sales clerk, Pistecchia, that he wanted to return the tennis rackets that he had previously purchased (20, 59). The appellant handed the sales clerk a sales slip which was dated March 14, 1974. The sales slip indicated that the appellant had purchased two Wilson T-3000 rackets and had returned a different racket on that date (59, 60). The appellant, in addition to handing the sales clerk the sales slip, took the two tennis rackets out of the shopping bag and placed them on the sales counter (20). The sales clerk took the tennis rackets from the appellant (61). During this entire period, the appellant was being observed by the two store detectives who were standing in the adjacent record department (119).

The sales clerk, Pistecchia, proceeded to the back of the stock room, adjacent to the Sporting Goods department, where he was met by one of the store detectives, Starrish (21). The detective Starrish told Pistecchia that he had seen the appellant take the tennis rackets from the wall display and that the appellant had not entered Gimbels with the rackets (21). Starrish instructed Pistecchia to continue with the transaction (21). The sales clerk proceeded to take a return voucher to the counter where the appellant was waiting. The return voucher was filled out containing the following entries: two Wilson T-3000 rackets for a total of $99.98 plus $7.00 tax for a total of $106.98 (63). The sales clerk left the Sporting Goods department to get an approval of the transaction by a store manager (63), returning to the area after a duration of five to ten minutes (21). The sales clerk handed the return voucher to the appellant who signed said voucher (22).

The appellant was instructed by the sales clerk to take the return voucher to the credit department on the third floor of Gimbels where he would receive credit for the

merchandise (64). As appellant was leaving the Sporting Goods department with the return voucher, he was stopped by the store detectives Bendetson and Starrish (22). The detective Starrish confronted Lipinski with the facts he had observed and asked that he come with him (22). They proceeded up the stairs toward the main floor. At the top of the stairs, Lipinski broke loose from the detectives and started to run. The detectives, however, were able to restrain him (23). The appellant would not subsequently answer any preliminary interrogation as to his name or address (23). The return voucher given appellant by the sales clerk was found by detective Starrish behind the chair in which the appellant Lipinski was asked to sit while in the Gimbels Security office (25).

At the trial, the people called the store detective Starrish as their first witness. The detective testified that he had notified the sales clerk of the appellant's false representations about the tennis rackets prior to the delivery of the return voucher to the appellant (21). At the conclusion of Starrish's testimony, the appellant moved to dismiss the people's case on the ground that the sales clerk consented to the transfer of the property, i.e., the return voucher. The court denied the motion to dismiss (xiv) but charged the jury that the defendant could not be charged with or found guitly of petit larceny, as originally charged. The court instructed the jury to consider only the charge of attempted petit larceny, the elements of which the court set out (4).

The appellant called the complainant, store detective Bendetson, as his first witness. Thereafter, he attempted to impeach the credibility of his witness Bendetson by use of a tape recorded interview dated March 16, 1975 between the complainant and the appellant's father. The court denied the appellant's request that he be allowed to impeach the testimony of his witness Bendetson through the use of the recorded interview (111), on the grounds that, first, the statutory grounds for impeachment of one's

own witness had not been met (145); and, second, the taped interview was not competent evidence upon which one's own witness may be impeached (102).

ARGUMENT

Appellant Was Not Denied His Sixth Amendment Right To Confront A Witness.

At the time of his trial, appellant called as a witness one of the two store detectives who had observed his actions. After placing the witness on the stand and questioning him, the appellant thereafter attempted to "impeach" his witness' credibility. The trial court, acting on the objection of the Assistant District Attorney, would not permit this. The Judge, by so ruling, was following the traditional New York rule of evidence that a party may not impeace his own witness.

The "voucher" rule, as it is commonly called, is followed not only in New York State but in many other American jurisdictions as well. In *Greenleaf On Evidence* (16th Ed. #442), the reason for the rule is cited thusly:

> "When a party offers a witness in proof of his cause, he thereby in general represents him as worthy of belief. He is presumed to know the character of the witness he adduces; and having thus presented them to the Court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief, for this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him."

(See also, Richardson On Evidence, Tenth Edition, #508; *Trial Handbook for New York Lawyers,* Aaron J. Broder,

#149 at page 85.) The New York Legislature, through enactment of Crminal Procedure Law #60.35, has permitted a narrow exception to this rule. The appellant, however, did not come within the scope of this act of legislative leniency.

There can be no doubt that the individual states may create their own rules of evidence (*Dutton* v. *Evans*, 400 U.S. 74 (1970); *Maness* v. *Wainwright*, 512 F.2d 88 (5th Cir.—1975). 519 F.2d 1085; 528 F.2d 138 (1976). As stated in *Bassett* v. *Smith* (464 F.2d 347, 351 (5th Cir.—1972), "The due process clause has always been interpreted as permitting the states wide latitude in fashioning rules of evidence and procedure." (See also *Maggitt* v. *Wyrick*, 533 F.2d 383 (8th Cir.—1976).) The appellant, in his brief, cites four cases to support his position that the exercise of the "voucher" rule by the state trial court violated his sixth amendment right to confront a witness. However, the first three cases cited (*United States* v. *Scarbrough*, 470 F.2d 166 (9th Cir.—1972); *United States* v. *Bryant*, 461 F.2d (6th Cir.—1972); *United States* v. *Lineberger*, 444 F.2d 122 (4th Cir.—1971), *Cert. denied*, 404 U.S. 1060 (1972)) dealt with the prosecution of federal crimes in United States courts. These cases would be clearly inapplicable to the instant case in-as-much as they dealt solely with the federal rules of evidence. At no point was a state evidentiary rule involved.

The fourth case cited by appellant is *Chambers* v. *Mississippi* (410 U.S. 284, 1973). This case involved a defendant convicted of murder in a state court in Mississippi. The conviction was reversed by the United States Supreme Court on the grounds that the defendant had been denied a fair trial because at the trial he was not allowed to cross-examine a witness due to Mississippi's common-law "voucher" rule *and* because the testimony of three witnesses to whom someone else had confessed the crime were held to be inadmissible due to the hearsay rule. The Court

took great pains to point out that their ruling was limited to the facts and circumstances of that case (at page 403), and that further "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holdings signal any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures (at pages 302 and 303).

In *Maness* v. *Wainwright* (512 F.2d 88), a state prisoner filed a petition for writ of habeas corpus, which relief was denied by the United States District Court. The petitioner had sought this relief on the ground that he had been denied the due process of law, because under Florida's "voucher" rule, he had not been permitted to cross-examine his wife whom he had called as a defense witness. In affirming the decision of the District Court, the Court of Appeals proceeded to state that:

> "We believe, however, that the interpretation of Chambers offered by Maness is too broad. The Supreme Court did question the wisdom of the common law voucher rule in the context of criminal trials, particularly in the situation faced by Chambers: a witness vital to the defense yet unlikely on direct examination to give favorable defense testimony could be brought to the witness stand only by the defense's foregoing the ability to cross-examine and impeach that witness. However, the Court did not base its reversal of Chambers' conviction on a violation of his sixth amendment right to confront the witnesses against him (citation omitted). Rather, the Court concluded that a combination of the voucher rule and the hearsay rule, as applied, 'denied [Chambers] a trial in accord with traditional and fundamental standards of due process.' "

(*Maness* v. *Wainwright, supra,* at pages 90 and 91.)

In commenting on the Supreme Court's statement in *Chambers* that it was not their intention to establish any new principles of constitutional law (*Chambers* v. *Mississippi*, *supra*, at page 302), the Court of Appeals in *Maness* commented that:

> "If Chambers was intended to cast a pall of unconstitutionality upon all state voucher rules, it would have established a new principle of constitutional law. Likewise, if Chambers meant to suggest that due process is denied when the exclusion of defense evidence pursuant to long-standing rules of evidence results in a less persuasive defense, it would also have established a new principel of constitutional law."
>
> (At page 91.)

Thus, it can be concluded that states have the right to create their own procedural rules for criminal trials, and that these are subject to federal review only when they conflict with the United States Constitution (*U.S. Ex Rel. Longstreet* v. *Warden, Ill. St. Pen.*, 414 F. Supp. 674 1975)). The "voucher" ruel as applied in this case provided no such conflict.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 40-04 Vernon Blvd., Long Island City, NY 11101 That on February 14, 1977, he served 2 copies of Brief

on

William J. Gallagher, Esq.
The Legal Aid Society,
Federal Defender Services Unit
509 United States Court House
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by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Jerry Simmons

Sworn to before me this
14 day of February, 1977

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977